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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 262.

THE CHAPMAN & DEWEY LAND COMPANY,
PLAINTIFF IN ERROR,

vs.

CHARLES H. BIGELOW, N. P. BIGELOW, L. P. WALKER AND F. H. HARTSHORN.
DEFENDANTS IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

N. W. NORTON.
Counsel for Defendants in Error.

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ADDITIONAL BRIEF.

Having received the brief of the plaintiff in error, the defendant in error will now file an additional brief and argument in response thereto.

Plaintiff in error being the owner of Fractional Sections 2, 3 and 4, on the north, and 35 and 36 on the southeast, in Township 12 north, Range 6 east, claims in this suit the intervening land—some five miles across from north to south, bounded on the west by the St. Francis River, and on the east, some

four or five miles distant from the river, by surveyed lands belonging to the plaintiff in error. The land, several thousand acres in quantity, is colored red on the map attached in the back of the brief filed for plaintiff in error. A meander line, made by the government survey, appears on all sides except the the west, which is the river line.

OF THE CLAIM BY ACCRETION AND RELICTION.

The claim of the plaintiff in error, originally made, was that this body of land was formed against its abutting fractional sections by accretion and reliction, as shown by the following excerpt from the complaint:

"Afterwards, by process of accretion in some instances and reliction in others, the line of said tracts of land which border on the water was gradually extended, and the said tracts of land and each of them were gradually built up by the imperceptible increase thereof, caused by the deposit of earth, sand and sediment thereon by the contiguous water, so that the land now extends a considerable distance further towards the main channel of the river, and there is now outside of and beyond the original lines of said survey, as above set out, and east of the main channel of the St. Francis River, a con-

siderable body of land adjacent to each of the tracts hereinbefore mentioned, and forming a part thereof and accruing to the plaintiff by reason of the accretion and reliction aforesaid and by the nature of the conveyances above set out." (Printed Record, 27 and 28.)

This allegation of accretion and reliction is denied in the answer:

"These defendants deny that by process of accretion the line of said tracts bordering on the water was gradually extended, and deny that said tracts and each of them were gradually filled up by the imperceptible increase caused by the deposit of earth, sand or sediment, and deny that the land named extends a considerable distance further towards to main channel of the river, the fact being that the land at all times extended toward the main channel of the river, though at times overflowed, as it yet is at times." (Printed Record, 78–9.)

In an effort to prove the fact of accretion and reliction, the plaintiff in error introduced the depositions of Peters, Davis and Varner. To meet this proof and combat it, the defendant in error introduced the depositions of John M. Biggs, Chas. S. Odom and James Anthony. The tendency of this testimony on the part of the defendants in error was

to show the nature of the land, timber and vegetation, and the extent to which it included sloughs and small lakes, to show that it was substantially the same as it was at the time of the survey, and that at the time of the survey it was land only temporarily covered with water. This testimony, though responsive to that introduced by the plaintiff in error, stands excepted to as contradictory of what is shown by the government plat.

Plats and surveys are not conclusive.

Horne vs. Smith, 159 U. S., 40.

Niles vs. Cedar Point Club, 175 U. S., 300.

Here, however, the testimony does not dispute the surveyor's notes, which are to the effect that the body could not be surveyed at the time he was there. (Printed Record, 115.)

The claim by accretion or reliction stands abandoned, as we understand from the following language in the brief of plaintiff in error, on page 14:

"The unsurveyed region claimed by plaintiff in error, up to the channel of St. Francis River, being unnavigable, the accretion and reliction allegations in the complaint become unimportant, and the evidence to show present conditions and gradual filling up also become unimportant. Plaintiff in error claims by riparian right the bottom to the channel

of the St. Francis River, wet or dry, hence there is no occasion to abstract the depositions of Peters, Davis and Varner, as to present conditions and gradual filling up."

While this claim existed it raised no Federal question.

THE MEANDER LINES WERE RUN AS BOUNDARIES.

That they were run as boundaries, is several times alleged in the complaint. Of the line of Hatchie Coon Island, the allegation is: "The body of land surveyed as last aforesaid lies at the southern point of an island in the Sunk Lands of the St. Francis River, known as Hatchie Coon Island. The survey in meandering the southern boundary of this island calls for the margin of the water as the boundary in all cases."

It is to be noted that this is not a call for the River, but for the Sunk Lands of the St. Francis River.

Of the right hand chute of Little River, in Section 36, the allegation is: "This chute was meandered for a boundary of the western and northern lines or boundaries of the land in Section 36, lying east thereof." * * * * * "That part of Section 36 lying west of said chute was meandered along said chute for an eastern boundary, and along

'Cut Off Lake' for a northern boundary." * * * * "In surveying Section 35, the Sunk Lands and said 'Cut Off Lake' were meandered for the northern and western boundary."

"In said survey Section six, (6), seven, (7), eighteen, (18), nineteen, (19), and thirty, (30), in Township twelve, (12) north, range seven, (7), east were meandered along the water, the field notes calling for the margin of the Sunk Lands of the St. Francis River as a boundary." (Printed Record, pp. 24 and 25.)

This meander line last mentioned is, by the testimony of George C. Peters, a witness for plaintiff in error, along Old River. His language, is: "At the time I was there the water was just about waist deep in it, and it has always been my idea that when the government made their survey they meandered Old River." (Printed Record, 93).

James Anthony, a witness for the defendant in error, gives testimony to the same effect: "The meander line through Section 6, 7, 18 and 19, on down until the meander line intersects the 'Scatters,' follows the old steamboat channel known as the 'Old River' channel. Long years ago the 'Old River' channel was opened and navigable for boats, and during the Fall of 1876 was used as a

clearer and better channel than the main St. Francis." (Printed Record, 130).

As these surveys followed Cut Off Lake, the right hand chute of Little River and Old River, they were clearly boundaries, under the rule laid down in Horne vs. Smith, 159 U. S.. 40.

Anyhow, the allegation was made that they were run as boundaries, and the answer admits it to be true:

"It is true that said lands and the legal subdivisions were meandered, but these meandered lands (meander lines) even where they called for the St. Francis River, were many miles distant from the said river, and were run as boundaries." (Printed Record, 78.)

Thus, as a matter of pleading, as well as a matter of fact and law, the meander lines were boundaries.

Plaintiff in error, however, now contends that they were not, in the following language:

"The truth, however, is that the meander lines were run, not as boundaries, but to show the sinuosities of the water, which was the real boundary; and whatever rights the State acquired beyond the water line were riparian rights, incident to the main grant, and passed from the State to its grantees as

riparian owners, in the same way that they were acquired by the State." (Brief for Plaintiff in Error, page 63.)

A contention about boundaries, however, raises no Federal question.

Lanfear vs. Hunley, 4 Wall.: 204.
Moreland vs. Page, 20 How., 522.
Barbarie vs. Mobile, 9 How., 451.
Almonester vs. Kenton, 9 How., 1.

In one aspect of the case, it is apparently immaterial whether the meander lines were run as boundaries or not. In any event, the extent of the rights acquired by the purchaser from the State of the fractional abutting sections, would be determinable by the general law, or the particular law of the State. But, with the lines run as boundaries, a purchaser of the fractional sections from the Government would take nothing beyond the meander line; and the State in disposing of the fractional sections could well adopt a similar rule, and allow its grantee no greater right than a purchaser from the Government.

OF THE CLAIM OF THE PLAINTIFF IN ERROR.

It acquired the fractional sections through mesne conveyances from the State of Arkansas. Its

claim is that it owns the many miles in width outside the fractional sections and between them and the St. Francis River.

Running through the brief of plaintiff in error we find the view entertained that if the State of Arkansas acquired the title to the lake bed, that this same lake bed necessarily passed to plaintiff in error by the purchase of the fractional sections. In short, the idea is held out, though not stated in express terms, that the title of the plaintiff in error to the unsurveyed lands is as good as that of the defendants in error. An argument built upon this premise must fall, for it overlooks the rule of law which requires the plaintiff in error to first show title, before it can concern itself, advisedly, with defects in the title of the defendant.

The title of the State to the unsurveyed lands is beyond dispute.

First: If the alleged lake was a body of water, at the time of the survey, it became the property of the State by reason of its sovereignty, regardless of patents.

Second: If submerged land, it became the property of the State by being within the limits of the patent, as held in Keen vs. The Calumet Co., 190 U. S. 452, and

Third: If land at the time, and not submerged,

it still passed by the patent for township 12, north, range 6 east, "for which the Governor of the State of Arkansas did, on the 20th day of October, one thousand, eight hundred and fifty-three, request a patent to be issued to the said State as required in the aforesaid act." (Printed Record, 35).

The patent says nothing of sections or parts of sections.

So the township was selected and patented in strict compliance with the requirements of the Swamp and Overflowed Land Act.

Hence, it is a mistake to say that these lands have never been selected as swamp and overflowed land, and a misconception to suggest that the title to them could be in the United States.

In speaking of the rule which requires quantity to give way to natural objects and metes and bounds, Judge Marshall, said: "The general effect of this principle undoubtedly is, that the purchaser acquires more land than is expressed in his grant, and more than he has paid for."

Newsom vs. Pryor's Lessee, 7th, Wheat, 194.

There we see the rule is enforced even when it gives the grantee more than he was entitled to. As between the government and the State of Arkansas, however, the State was entitled to all the

swamp and overflowed lands, and no injustice was done the government, if as a fact, there was a greater quantity of land within the boundaries of the township, than the surveyors laid off in fractional sections.

A Claim of Riparian Rights Presents No Federal Question.

The plaintiff in error was denied his claim to the unsurveyed portions of the township and the question is, did the denial of the claim include a denial of any right through any treaty or federal authority. That riparian rights raise only questions of general law is entirely settled. If the plaintiff in error held the fractional sections as the direct patentee of the United States, still its title to submerged lands adjoining, would be governed by the law of the State. This proposition was reiterated by this Court in Hardin vs. Shedd, 190, U. S., 508; 23 Sup. Ct., Rep., 685. In the text of the opinion the Court says of the rule: * * * "It has become established almost without argument * * *", citing,

Hardin vs. Jordan, 140 U. S., 371.
Shively vs. Bowlby, 152 U. S., 1.
Grand Rapids & I. R. Co., vs. Butler, 159 U. S., 87.
St. Anthony Falls Water Power Co., vs. St. Paul Water Works Com'rs. 168 U. S., 349.

A decision of a State court, adverse to a claim of title to a lake bed, presents no Federal question which will sustain a writ of error from the Supreme Court of the United States.

Iowa vs. Rood, 187 U. S., 97;
23 Sup. Ct. Rep., 49.

The writ of error to the State court was dismissed.

A decision of the State court adverse to the claim that under Mexican and Spanish grants, confirmed and patented under the Act of Congress of March 3d, 1851, the owners of the land were entitled to riparian rights and subterranean waters, involves no Federal question reviewable in the Supreme Court of the United States, where the validity of such act was not drawn in question

Hooker vs. Los Angeles, 188 U. S., 314; 23 Sup. Ct. Rep., 395.

The writ of error was dismissed.

This Court is not called on to revise the views of the principles of general law considered applica- to the case in hand.

Sayward vs. Denny, 158 U. S., 180; 15 Sup. Ct. Rep., 777.

A Common Source of Title.

On writ of error to a State court, a common source of title has always been fatal to the jurisdiction of this Court.

It is the view of the defendants in error that the parties to this litigation have a common source of title.

This view is concurred in and twice expressed by plaintiff in error.

"Plaintiff in error and defendants in error claim under a common source of title—the State of Arkansas." (Brief of Plaintiff in Error, p. 97.)

"Plaintiff in error and defendants in error claim under a common source of title--the State of Arkansas." (Brief of Plaintiff in Error, p. 100.)

This being settled, it remains to apply the law.

In Shaffer vs. Scudday, 19 How., 16, both parties claimed under the State of Louisiana. The writ of error was dismissed.

In Romie, et al, vs. Casanova, 91 U. S., 379, the entire opinion of Chief Justice Waite is as follows:

"No Federal question is presented by the record in this case. The action was brought to recover the possession of certain lands. Both parties claimed title from the city of San Jose; and the question to be determined was, which of the two had actually obtained a grant of the particular premises in controversy. The title of the city was not drawn in question. Even if it depended upon the treaty of Guadaloupe Hidalgo and the several Acts of Con-

gress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it. The writ is dismissed."

In a suit for the recovery of lands, where both parties claim under a common grantor, whose title from the United States is admitted, the Supreme Court of the United States has no jurisdiction for the review of the decisions of the State courts upon questions relating only to the title acquired by the several parties.

Hastings vs. Jackson, 112 U. S., 233; 5th Sup. Ct. Rep., 113.

In McStay vs. Friedman, 92 U. S., 723, certain lands were confirmed to the city of San Francisco by an Act of Congress. In ejectment for a portion tion of them, no question being raised as to validity or operative effect of the Act of Congress, it was held there was no jurisdiction in this Court to review the decision of the Supreme Court of the State of California.

In Mace vs. Merrill, 119 U. S., 581, 7th Sup., Ct. Rep., 330, error to the Supreme Court of California, this Court held there was no jurisdiction,

and the writ of error was dismissed, both parties claiming under that State

Of the Letter from the Secretary of the Interior to the Commissioner of The General Land Office.

The incompetency of this letter passing between officials, would be plain to plaintiff in error, if opposed to its contentions. For example, if the Secretary of the Interior had known that the Township was patented to the State as a whole, and that the meander lines were run as boundaries, and, in consequence, had expressed the opinion that the owner of the fractional sections acquired no rights to the unsurveyed lands, the point of view would have been materially changed and the want of binding qualities in the letter would have been easily realized.

Here, there was no attempt on the part of the Secretary of the Interior or Commissioner to settle anybody's rights. There was nothing pending before the department.

Acts of the department have frequently been said to raise no Federal question, even where there had been some character of actual ruling.

The fact that a decision was rendered by the Secretary of the Interior upon the validity of loca-

tion by one of two claimants in the State Court, does not raise a Federal question so as to give this Court jurisdiction.

Shaffer vs. Scudday, 19 How., 16.

In Hardin vs. Jordan, 140 U. S., 371, it was held that the action of the Department in surveying and granting land formerly submerged, was not *res adjudicata* as against one claiming under the earlier patent, though he appeared before the Department and resisted its action.

In Iowa vs. Rood, 187 U. S., 87, it was held that the action of the government surveyors in segregating and setting apart a lake by a meander line from the public land, is not such an adjudication by the authorized officers and agents of the Government that such lake is the property of the State, as will cause a Federal question, reviewable on writ or error to the Supreme Court of the State.

The writ of error should be dismissed.

Respectfully submitted.

N. W. NORTON,

Counsel for Defendants in Error.